

**REMARKS OF FCC COMMISSIONER AJIT PAI
ON RECEIVING THE 2015 JERRY B. DUVALL PUBLIC SERVICE AWARD
AT THE PHOENIX CENTER 2015 ANNUAL U.S. TELECOMS SYMPOSIUM**

WASHINGTON, DC

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I am honored to accept the Jerry B. Duvall Public Service Award. Jerry's civil service has been exemplary. Since 1978, he has advised countless Commissioners and Bureau Chiefs at the FCC. And Jerry has been a prodigious economist, covering practically every sector of the communications industry. He has explored non-price competition in the broadcast sector, studied how regulatory barriers to entry deter competition in the cable market, explained how concentrated markets can be highly competitive, and examined the sunk costs of satellite launches. It's precisely because my own career has not been as lengthy or distinguished that I'm humbled to receive this award. I hope to live up to Jerry's good name in the years to come.

I also appreciate this opportunity to address the Phoenix Center for Advanced Legal & Economic Public Policy Studies. Since the force that is the Phoenix Center awakened 17 years ago, you've offered policymakers rigorous economic analysis and legal acumen second to none. Reading Phoenix Center publications always gives me a new hope that common sense and logic will rule the day in tech policy. Whenever shoddy reasoning enters the public dialogue, your scholars strike back and return to the facts—elegant weapons for a more civilized age. You are the rebels seeking to contain the government's regulatory empire.

Let's start with one fact that the Phoenix Center repeatedly points out: Competition in the communications marketplace is a Force to be reckoned with. By the FCC's last count, 99.6% of Americans can choose from at least three wireline telephone competitors, and 92% can choose from 10 or more. 97% of Americans have three or more facilities-based mobile operators competing for their business while over 91% have four or more. And 4,462 Internet service providers are competing to offer broadband across the United States. They are replacing aging copper wires with fiber. They are upgrading from DSL to IP-based technologies like carrier-grade Ethernet. They are rolling out 4G LTE using small cells and distributed antenna systems. They are building very high-speed networks on the DOCSIS 3.0 standard. And they are launching satellites and balloons specially made to offer high-speed broadband in remote areas. To paraphrase Obi-Wan Kenobi, competition is "what gives the free market its power. It's an energy field created by all living things. It surrounds us and penetrates us. It binds the communications galaxy together."

The result is that the Bell-era monopolies that Congress sought to control through tariffing, accounting, and pervasive regulation just don't exist anymore. Almost half of all U.S. households have given up the landline. 45.4% rely only on wireless phones. And more than half of the residential landlines that remain are VoIP connections. To put it another way: The once-dominant incumbents lost over 55 million switched-access lines from 2008 through 2013, and they now serve barely a quarter of households.

And yet, every time the FCC takes a look at the marketplace, it brings to mind the words of Emperor Palpatine: "You will find that it is you who are mistaken . . . about a great many things." So in this year's *Broadband Deployment Report*, the agency concluded that broadband deployment was insufficient, even though 98.5% of Americans have access to 4G LTE services (that's 97.99 million more Americans than just two years before). In the *Title II Order*, the Commission decided that Google and Netflix needed regulatory protection from tiny broadband providers like Wave Wireless in my hometown of Parsons, Kansas. And in the *Emerging Wireline Networks Order*, the Commission decided to slow copper retirement and let our staff flyspeck every change a carrier makes to its business model in the

name of enhancing competition in the already competitive voice market. This is a mistake. Hokey economic models and ancient regulations are no match for a free market.

In each case, the FCC has expanded its own jurisdiction and extended its reach. In doing so, the FCC has just started to flex its newfound powers. It's granted forbearance from many of Title II's consequences "for now" and declined to regulate edge providers "at this time." But your eyes can deceive you; don't trust them. When *I* hear from some quarters of the industry, "I'm not afraid" (something, by the way, that I am hearing less and less with each passing day), I follow Yoda's lead and say, "You will be. You will be."

One place we may "witness the power of the FCC's fully operational battle station" is the special access proceeding. The Commission's plans to reregulate the special access market surfaced three years ago. Back then, it suspended the Clinton-era deregulatory framework for these services and then sought comment on possible reregulation of that market. Earlier this year, the Wireline Competition Bureau singled out four carriers for investigation at the behest of their competitors, emboldening those who'd rather invest in regulatory arbitrage than their own infrastructure. And it looks like the FCC is heading for full-scale rate regulation this coming year. This would only divert even more capital away from next-generation networks and back toward 1.5 Mbps special access services that are 17 times slower than the FCC's definition of broadband.

To be sure, some might "find [my] lack of faith disturbing." For one would hope that an agency would not fix an outcome without first factoring in the evidence. But time and again, the FCC has proceeded down the regulatory path *before* it could collect and analyze the troves of data we've said we need to understand this marketplace. And it's not even clear that we'll have data needed to analyze the marketplace fully and complete this proceeding. It took far longer than first anticipated to collect what data we have. And we've received far less data than we originally targeted. So we appear set on making a decision in 2016 based on a subset of data from 2013 that ignores potential competition from serious, facilities-based competitors. I hope I'm wrong and that the Commission won't impose outdated rules on the enterprise data services market. But unfortunately, "everything is proceeding as I have foreseen."

Speaking of outdated rules, the Code of Federal Regulations is replete with legacy regulations that target so-called incumbents. For instance, our Part 32 accounting rules require some carriers (but not others) to hire and train specialized accountants who have to maintain a reticulated set of 148 accounts and subaccounts designed for TDM-based telephone service. And our Part 61 tariffing rules span 39 pages, specifying how carriers must calculate their CCLs, EUCLs, APIs, and CMTs and how those calculations might differ for interLATA or intraLATA services. They even dictate the placement of a tariff's effective date in the lower right-hand corner of each page, as well as other minutiae. C-3PO remarked, after crashing on Tatooine, "We seem to be made to suffer. It's our lot in life." I'll bet many telecom accountants have said the same thing.

But even if you think the telephone market needs regulation, "these aren't the droids you're looking for." There is no federal use for the vast majority of the data required by our Part 32 accounting data—they're the definition of needless regulation. And our Part 61 tariffing rules are even worse. As the Commission recognized 30 years ago, tariffing "presents an opportunity for collusive pricing by competing carriers," leading to "anti-competitive" conduct that "can harm consumers through higher prices and services which do not meet their needs."

So what should the Commission do? *First*, we should follow through on last year's promise to streamline our Part 32 accounting rules by eliminating those rules entirely for price-cap carriers and replacing them with targeted accounting rules. *Second*, we should open a proceeding to end tariffing on all common-carrier services still subject to it, extending the successful framework we applied to long-distance services in the 1990s to the local exchange market of today. I'll be the first to admit these aren't the most exciting topics to discuss with my 8th floor colleagues: "Accounting rules. Hmmp! Tariffing. Hmmp! A Commissioner craves not these things." But like an ambitious Padawan, we have to show

the deepest commitment, the most serious mind in addressing these weedy issues if we want to reclaim our regulatory credibility.

The Commission will have one more chance to reconsider its approach to the communications marketplace later this month when it addresses a forbearance petition U.S. Telecom filed in October 2014. In that petition, U.S. Telecom sought relief from a series of outdated regulations whose costs far exceed any benefits. Early indications are that the majority of the forbearance sought will be granted. As Chairman Wheeler blogged last week, “These rules were adopted to protect or expand competition, but technological and market conditions have changed dramatically, making many of these rules outdated. Removing them will promote the ability of local phone companies to build out broadband and invest in modern and efficient networks.”

That’s a welcome surprise to those of us who have followed the FCC’s approach to forbearance over the last few years. When asked whether filing a forbearance petition would be helpful, I had gotten used to quoting Admiral Ackbar: “It’s a trap!” That’s because the agency made granting forbearance from economic regulations significantly harder just a few years ago in the *Qwest-Phoenix Order*. As the Phoenix Center has persuasively argued, it’s not enough anymore to show that a carrier is losing out to the competition and no longer dominates the market. Under the FCC’s approach, all existing regulations are presumed necessary and in the public interest—and the evidentiary burden to overcome this presumption is enormous.

The U.S. Telecom forbearance petition is a prime opportunity to move past this approach. And it’s a much-needed one given how absurd the regulations at issue are. Take the *Computer Inquiry* rules the FCC adopted in the 1980s. These rules protect narrowband enhanced service providers, like independent voicemail operators. In the digital era, these providers don’t need regulatory largesse. This is because broadband—either wireline or wireless—gives consumers far more powerful and useful services. That’s one reason why the Commission unanimously proposed to eliminate one component of those rules (the *Comparably Efficient Interconnection* requirements) and put forward a streamlined process for the elimination of the other component (the *Open Network Architecture* requirements) under Chairman Genachowski. We should do no less here.

But that’s not all. There are still regulatory holdovers from the breakup of AT&T in the early 1980s on our books. These rules, as old as *Return of the Jedi*, were intended to give competitors a chance in the then-burgeoning independent long-distance services market. Take our long-distance equal-access and dialing-parity rules, which mandate the unbundling of local service from long-distance for certain carriers. These requirements are unnecessary since all-distance packages are commonplace and consumers buy bundled packages from their wireless or VoIP provider. And they unnecessarily raise the cost of telephone service for anyone with a landline. In sum, they are as annoying as Ewoks and have to go.

Or how about the requirement that incumbents unbundle a 64 kbps channel when they retire copper in favor of fiber? A channel that small provides a tiny fraction of the capacity of what the FCC now calls broadband (0.25%), and it’s rarely used in practice. In fact, the chief proponent of keeping the requirement, Granite Telecommunications, admits having never ordered such a channel. And the obligation puts incumbents to a Hobson’s Choice: either they retire the copper and buy expensive equipment to unbundle a channel that no one will ever use, or they maintain the copper even if no one’s using it. Either way, capital that could be going towards more fiber deployment will be spent on regulatory compliance. We should drop this requirement faster than Luke ditched the Dagobah system.

As the Commission addresses these and other requests, there’s one more thing that forbearance-watchers will no doubt want to know: Is the Commission granting real, permanent relief or something less? One possibility is that forbearance will only be temporary. That’s what the FCC did repeatedly in the *Title II Order*. The lack of clear, permanent rules will only increase regulatory uncertainty and deter

investment. And it's not becoming of an agency to make half-hearted attempts to forbear. As Master Yoda might say, "Try not. Forbear . . . or forbear not. There is no try."

Another possibility is that the agency will opt for "fauxberance," to borrow an apt term my colleague Commissioner O'Rielly coined. That's when the agency says it will forbear from a statutory provision but then claims to nevertheless enforce that same requirement through its general jurisdiction. Or as Obi-Wan might put it: "Strike down that rule, and it will become more powerful than you could possibly imagine." It's a pernicious practice, and one that I cannot support.

I look forward to reviewing Chairman Wheeler's proposed resolution of the U.S. Telecom forbearance petition in the coming weeks. And I hold out hope that the FCC will revise our aging telephone system rules in light of the new, competitive marketplace. Outdated regulatory roadblocks are bad for consumers, bad for infrastructure investment, and bad for our nation's economic competitiveness. After all, networks don't have to be built. Risks don't have to be taken. Capital doesn't have to be invested. When the FCC makes it less attractive for companies to connect the American people, those companies will find other places to put their money.

And here is why, ultimately, all of this matters. The digital revolution is unleashing a tremendous amount of entrepreneurship and innovation. I've seen for myself, from Reno, Nevada to Savannah, Georgia, how anyone with a good idea and a broadband connection can compete in the online marketplace. And the Internet is also putting people in charge of their own lives in unprecedented ways. I've seen for myself, from New Orleans to North Dakota, how people are using Internet-based technologies like Uber and Instagram and Meerkat and Facebook to drive their own destinies. Search your own feelings, you *know* it to be true. Startup entrepreneurs in Kansas City recently told me that high-speed broadband is putting previously neglected places in the Midwest on the map. To them and others around the country, I say "Great, kids! But don't get cocky." For it takes a market-oriented regulatory approach to deliver an Internet that's become the great equalizer of our time.

Thanks again to the Phoenix Center for inviting me to speak and for giving me this award. May the Force be with you—always.